No. 77-997

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF HAWAII, PETITIONER

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CONSUMER PRODUCT SAFETY COMMISSION IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
JOHN H. SHENEFIELD,
Assistant Attorney General,
ROBERT B. NICHOLSON,
ROBERT J. WIGGERS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

THEODORE J. GARRISH,
General Counsel,
NORMAN C. BARNETT,
Solicitor,
Consumer Product Safety Commission,
Washington, D.C. 20207.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-997

STATE OF HAWAII, PETITIONER
v.
CONSUMER PRODUCT SAFETY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CONSUMER PRODUCT SAFETY COMMISSION IN OPPOSITION

OPINIONS BELOW

The final memorandum of the court of appeals (Pet. App. 14–16) and its earlier interlocutory order remanding the record (App. A, *infra*, pp. 9–11) are not reported.[1] The opinion and tentative order of the Consumer Product Safety Commission issued March 4, 1976, are published at 41 Fed. Reg. 9512. The concurring and dissenting opinions of Commissioners Franklin and Pittle were omitted from that publication and are reproduced as App. B, *infra*, pp. 12–20. The Commission's final order and rule (App. C, *infra*, pp. 21–43),

[1] Petitioner has neglected to reprint the materials required by Rule 23(1)(i) of the Rules of this Court. We have reproduced them as appendices to this brief for the convenience of the Court.

and its opinion and order on remand from the court of appeals (App. D, *infra*, pp. 44–50) are reported at 41 Fed. Reg. 22931 and 42 Fed. Reg. 34873.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14–16) was entered on October 5, 1977. Petitioner's motion for reconsideration and petition for rehearing were denied on November 18, 1977 (Pet. App. 17–18). The petition for a writ of certiorari was filed on January 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Consumer Product Safety Commission, in deciding for reasons of public safety to ban firecrackers with an explosive powder content of more than 50 milligrams, properly declined to provide an exception for larger firecrackers used in connection with religious celebrations.

STATEMENT

In 1972 the Food and Drug Administration (FDA) invited public comment on a proposal by the National Society for the Prevention of Blindness that FDA ban fireworks under Section 2(q)(1)(B) of the Federal Hazardous Substances Act, as added, 80 Stat. 1304, and amended 15 U.S.C. 1261(q)(1)(B). See 37 Fed. Reg. 6868.[2] In 1973 FDA published for comment pro-

[2] Regulations at that time allowed visual fireworks and firecrackers with a charge of not more than 2 grains (approximately 130 milligrams). 21 C.F.R. 191.65(a)(2) (1972 rev.).

posed rules banning all firecrackers. 38 Fed. Reg. 12880. The Consumer Product Safety Commission, which assumed jurisdiction over the matter in 1973,[3] subsequently published regulations totally banning firecrackers. 39 Fed. Reg. 17435. Pursuant to Section 3(a) of the Act, 74 Stat. 374, 15 U.S.C. 1262(a), which makes the requirements of Section 701(e) of the Federal Food, Drug, and Cosmetic Act, 70 Stat. 919, as amended, 21 U.S.C. 371(e)(2), applicable to certain hazardous substances cases, the regulations were stayed pending public hearings (J.A. 13).[4]

Evidence introduced at the hearings showed that fireworks, particularly firecrackers, cause a large number of injuries (see, *e.g.*, J.A. 131, 146, 242–243).[5] The State of Hawaii introduced evidence that firecrackers are used by some of its residents in religious ceremonies to drive away evil spirits and to attract benign deities or ancestral spirits (J.A. 432, 458–460). The ceremonies include openings of businesses, dedications of new houses, weddings, birthdays, funerals, and public celebrations such as the Chinese New Year (J.A. 459–462, 471–472). There was evi-

[3] Jurisdiction was transferred to the Commission by Section 30(a) of the Consumer Product Safety Act, 86 Stat. 1231, as amended, 15 U.S.C. (1976 ed.) 2079(a).

[4] "J.A." refers to the Joint Appendix filed in the court of appeals.

[5] Projections based on sample hospital statistics showed that at least 6,000 injuries were caused by fireworks each year (J.A. 131, 242), and that two-thirds of the victims were children under 15 years old (J.A. 135, 151–152, 242). Between 40 and 55 percent of the injuries were caused by firecrackers (J.A. 139, 243). The majority of small firecracker injuries were burns and lacerations of the hand, but there were also eye injuries and body burns (J.A. 158–163, 256–258).

dence that for some Buddhist celebrations no particular size of firecracker is necessary; the groups use whatever is donated and compensate for any smaller size by using larger numbers (J.A. 437–438). No other testimony concerned the size of firecrackers required in the ceremonies.

The Commission's hearing officer concluded that the regulation of firecrackers is "essentially a local matter" that does not require a federal ban (J.A. 82–83, 86); he recommended instead the use of a federal design and labeling standard (J.A. 86).

The Commission found that a ban is necessary (41 Fed. Reg. 9512; and see App. B, *infra,* pp. 12–20). It concluded that banning firecrackers containing more than 50 milligrams of pyrotechnic charge is justified by the substantial number of injuries firecrackers cause. The Commission commented on the religious use of firecrackers by the Chinese-American community, finding the use "sincere and necessary" (41 Fed. Reg. at 9518). It also noted, however, that an exemption for religious purposes, without a strict permit and distribution system to implement it, "could lead to serious abuse and could create serious enforcement problems" (*ibid.*).

The Commission concluded that Chinese religious uses did not require any particular size of firecrackers (41 Fed. Reg. at 9519, 9523). In part to accommodate Chinese religious needs, and also in the hope of reducing "bootlegging" of larger, more dangerous firecrackers, the Commission decided to permit small firecrackers with charges no larger than 50 milligrams

(*id.* at 9523-9524). The record indicated that such firecrackers caused few injuries, so that permitting their use, in light of available alternatives, was consistent with a policy of minimizing injuries (*id.* at 9523).[6]

The Commission adopted its tentative order as its final decision on June 2, 1976 (App. C, *infra,* pp. 21–43).[7] It again adopted this decision on June 30, 1977, on remand of the record from the court of appeals (App. D, *infra,* pp. 44–50).

The court of appeals affirmed the June 30, 1977, order, concluding that it is "based on findings supported by substantial evidence" (Pet. App. 15).

ARGUMENT

1. Petitioner, the State of Hawaii, contends that the failure of the Commission to allow the use of large firecrackers for Buddhist and other religious festivities violates the constitutional and statutory rights of the religious observants. The State has no stake in the resolution of this question. Hawaii does not itself practice any religion, and it may not attempt to foster religion. The Establishment Clause of the First Amendment, applied to the states by the Fourteenth Amendment, forbids any involvement by Hawaii in

[6] Commissioner Franklin concurred and Commissioner Pittle dissented in part. They agreed that the record supported a finding that firecrackers were hazardous. They would have banned all firecrackers, subject to a religious exemption that was based on a permit and distribution system (App. B, *infra*, pp. 12–20).

[7] The State of Hawaii filed an objection to the tentative order, reiterating its demand for a religious exemption for firecrackers. It argued that the size of the device was important, but it cited no support in the record, and the State did not request further hearings or proffer any further evidence.

religion. Hawaii therefore must be attempting to invoke the rights of its residents.

Assuming arguendo that the Establishment Clause allows a state to invoke the religious rights of its residents, we submit that Hawaii lacks standing to do so. States may sue as *parens patriae* only "to prevent or repair harm to [their] 'quasi sovereign' interests." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 258. When several states attempted to assert that a statute deprived their residents of privileges and immunities of citizenship and caused indirect injury to the treasury of each state, the Court stated: "The short answer to these contentions is that both [constitutional] Clauses protect people, not States." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665.[8] The short answer in the present case is that the Free Exercise Clause of the First Amendment, which Hawaii apparently contends is violated by the firecracker ban,[9] protects people, not states. The most Hawaii can say is that a diminution of religious celebrations would affect its economy, but that is not enough (in the absence of a special statute)

[8] The Court continued (*ibid.*): "It has * * * become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens."

[9] The petition refers to the Establishment Clause (Pet. 4), but we assume that the State relies on the Free Exercise Clause.

to give a state standing.[10] *Hawaii* v. *Standard Oil Co.*, *supra*.

2. However that may be, the Commission's rule is not open to challenge. Hawaii appears to contend that the Commission was required to "prove" that firecrackers with an explosive charge of no more than 50 milligrams would satisfy all religious requirements. But it was enough for the Commission to adduce substantial evidence to show the desirability of a general proscription of large firecrackers as hazardous substances. The Commission met that burden. Once it had done so, it had no further burden to rebut every possible argument for exemptions to the general rule. See S. Doc. No. 248, 79th Cong., 2d Sess. 208, 270 (1946). It is simple common sense that the practitioners of a religion who seek the benefit of a special exception from an otherwise-desirable rule have the best access to the necessary information and should come forward with facts and supporting arguments.

On the record before it, the Commission could reasonably conclude that the religious uses of firecrackers do not require any specific powder content and that 50 milligram charge firecrackers therefore will

[10] What is more, it has long been settled that states may not represent their residents as *parens patriae* in suits against the United States or its agencies, because the federal government also presumptively protects its residents. See, *e.g.*, *Massachusetts* v. *Mellon*, 262 U.S. 447, 485–486.

satisfy religious and cultural needs. It was not required to do more than it did."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JOHN H. SHENEFIELD,
Assistant Attorney General.
ROBERT B. NICHOLSON,
ROBERT J. WIGGERS,
Attorneys.

THEODORE J. GARRISH,
General Counsel,
NORMAN C. BARNETT,
Solicitor,
Consumer Product Safety Commission.

MARCH 1978.

[11] Moreover, public regulation of *conduct* is appropriate even though adherents to religious beliefs might prefer to behave differently. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (collecting cases). Sale of firecrackers for religious purposes would inevitably result in distribution to and injury of third parties, and the ban therefore would have been permissible even if it prevented some persons from acting in accord with their religious beliefs.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1976

(No. 76–1495)

NATIONAL SOCIETY FOR THE PREVENTION OF BLINDNESS, INC., ET AL., PETITIONERS
v.
CONSUMER PRODUCT SAFETY COMMISSION, RESPONDENT
OKLAHOMA PYROTECHNICS ASSOCIATION, ET AL.,
INTERVENORS

(No. 76–1723)

OKLAHOMA PYROTECHNICS ASSOCIATION, PETITIONER
v.
CONSUMER PRODUCT SAFETY COMMISSION, RESPONDENT

(No. 76–1788)

MIKE'S FIREWORKS & TOYS, INC., PETITIONER
v.
CONSUMER PRODUCT SAFETY COMMISSION, RESPONDENT
AMERICAN PYROTECHNICS ASSOCIATION, INTERVENOR

[Filed June 23, 1977; George A. Fisher, Clerk]

257-379—78——2

Petitions for Review of an Order of the Consumer Product Safety Commission

Before: Wright and MacKinnon, *Circuit Judges,* and Markey,* *Chief Judge,* United States Court of Customs and Patent Appeals.

Order

These causes came on to be heard on petitions for review of an order of the Consumer Product Safety Commission and were argued by counsel.

In its decision banning certain fireworks the Commission stated that: "Findings of fact numbered 9–11, 14–16, 18–21 and supplementary findings thereto of the Commission's *tentative* decision, 41 FR 9516–9523 . . ." shall be "allowed to stand and [to be] . . . incorporated [in the Findings of Fact] as the *final* decision of the Commission *by reason of a divided vote.*" 41 Fed. Reg. 22934 (J.A. 120) (emphasis added). This quoted statement does not indicate that the Commission has, by the required majority, made findings of fact that are sufficient to support all aspects of its proposed rules. Therefore, its action does not indicate that the Commission is presently in compliance with the express mandate of Section 701 (e)(3) of the Federal Hazardous Substances Act, 21 U.S.C. § 371(e)(3) (1970). In addition, the Commission's Finding of Fact No. 12 reverses without explanation the contrary finding of the Presiding Officer.

The *"tentative* decision" (emphasis added) once reached by a 3 to 2 vote of the Commission, which subsequently can only command a 2 to 2 vote, cannot be considered as presenting the same factual situation

*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

as when a *final* decision of a trial or appellate court is allowed to stand because the next appellate court is equally divided and hence there are insufficient votes to overturn the *final* decision of the trial court. Since the earlier action of the Commission only produced a *"tentative* decision" there has never been a legal vote elevating that "tentative decision" to a "final decision." Somewhere, at some time, a majority vote of the Commission is necessary in order to produce a *final* decision that can be considered to constitute the legal action of the Commission.

On consideration of the foregoing difficulties with the administrative record, it is ORDERED and ADJUDGED by this court that the record in this case is hereby remanded to the Commission so that it may clarify the factual basis for its final rules and take all action necessary to bring its rules into full statutory compliance.

Per Curiam.

For the court,

GEORGE A. FISHER,
Clerk.

APPENDIX B

THE CONSUMER PRODUCT SAFETY COMMISSION OF THE UNITED STATES OF AMERICA

In the Matter of the Regulation of Fireworks Devices

[Docket No. CPSC 74–3]

Concurring Opinion of Commissioner Barbara Hackman Franklin

Today, in the above-entitled matter, the Commission issued a Federal Register notice which sets forth rulings on exceptions, findings of fact, conclusions of law and a tentative order. Before issuing a final order, the Commission will allow 30 days for the parties of record to file exceptions, in accordance with 21 CFR 2.97(b).

The decisions indicated in the Federal Register notice are a reflection of the Commission's vote of February 19, 1976. I concur—with one important reservation—in that vote. The Commission decided to permit the distribution in interstate commerce of those firecrackers intended or packaged for use in or around the household which have a pyrotechnic composition of 50 milligrams (.772 grain) or less by weight. In my opinion, the substantial evidence of the record simply does not support a differentiation between the explosive charge of .772 grain permitted by the Commission and that of 1 grain or .001 grain greater—which the Commission would outlaw. The record draws no such artificial distinction, but rather compels a ban on all firecrackers intended or packaged for household use. Moreover, I believe it is necessary to carve out of this ban a narrow exception to permit the usage of these firecrackers for *bona fide* religious ceremonial purposes.

In addition to this reservation concerning the firecracker ban, I wish to comment on Section 701(e) of the Federal Food, Drug and Cosmetic Act which governed the Commission's twenty-two month ordeal to establish a regulation for fireworks. That section of the law results in proceedings—such as this one—which are unduly cumbersome, needlessly time-consuming and inordinately expensive in terms of both public and private resources. In short, it is a regulatory nightmare.

THE BAN ON FIRECRACKERS

Up until now, firecrackers with a charge of 2 grains or less of pyrotechnic composition were exempted (16 CFR 1500.85[a][2][ii]) from the Federal ban on all firecrackers issued by the Food and Drug Administration and enforced by that agency and, upon transfer of authority in 1973, by the Commission. The question whether and to what extent firecrackers containing 2 grains or less should be banned was the principal issue litigated during this proceeding.

Firecrackers in this category are called Class C firecrackers. Two common production units are the 1½" size which has about 2 grains of powder (the "common firecracker") and the ⅞" size which has about .772 grains of powder (the "ladyfinger").

I agree with the majority that the record is convincing that Class C firecrackers do cause serious injury. I agree with the majority that with respect to Class C firecrackers intended or packaged for household use, the protection of the public health and safety can be adequately served only by keeping them out of

the channels of interstate commerce. But the substantial evidence of the record simply does not support .772 grains of powder as the basis for an across-the-board standard of nation-wide applicability.

FIRECRACKER BAN VERSUS RELIGIOUS EXEMPTION

The primary reason for the creation of the artificial distinction at .772 grains is the Commission's finding that it must accommodate the religious needs of the Chinese-American community. As stated by the Commission:

> The record discloses that firecrackers are an important part of the religious ceremonies, including the Chinese New Year, the Ching Ming festival, weddings, birthdays, baby parties, funerals, and various other occasions. The record further demonstrates that use of firecrackers for religious purposes is deeply rooted in tradition with a long standing centuries old history. The Commission is convinced from the record that the religious use is sincere and necessary.

I agree completely with this finding; the uncontradicted evidence of record clearly establishes that there is a *bona fide* religious use for firecrackers among the Chinese-American community. The problem is clear, but what is questionable is the way in which the Commission majority attempts to justify a solution to the problem:

> The record does not indicate that the smaller firecrackers will not satisfy the religious needs of the Chinese-American community.

Unfortunately, the substantial evidence of the record does not sustain the majority's solution.

Rather, the record shows that the smaller firecrackers or "ladyfingers" will not satisfy Chinese-American religious needs. The majority even concedes that "historically the 1½" common firecracker has been utilized for religious ceremonies."

In my opinion, all Class C firecrackers—both common firecrackers and ladyfingers—should be banned. However, I believe it appropriate to carve out of this band a narrow exception to permit the useage of firecrackers for *bona fide* religious ceremonial purposes. Such an exemption was supported by the Commission staff counsel, the Health Research Group, the American Public Health Association, the National Society for the Prevention of Blindness, Inc., and other parties to the proceeding. Several of these parties argued that, to eliminate potential enforcement problems, the exemption should require that a qualified agency, designated by the state or local government, distribute firecrackers to recipients for *bona fide* religious ceremonial purposes, after the recipients have obtained a permit from the appropriate local law enforcement agency.

The exemption of firecrackers by means of a permit and distribution system is not a new idea. The existing agricultural exemption from the ban on Class B firecrackers (such as cherry bombs, M–80 salutes, silver salutes and other larger firecrackers) provides an example. That exemption authorized distribution of Class B firecrackers for *bona fide* agricultural use under a permit system implemented by the U.S. Department of the Interior and/or appropriate state agencies. 16 CFR 1500.17(a)(3).

This approach should have been tried. The record clearly supports it, while the substantial evidence does not support the Commission majority's solution to the problem of a firecracker ban and religious exemption.

COMMENT ON SECTION 701(e)

This proceeding to regulate fireworks is far from over. The Commission's tentative order is published today to allow 30 days for the parties of record to file

exceptions to it. The Commission will consider the exceptions filed, rule on them and issue a final order. Under the governing law, Section 701(e) of the Federal Food, Drug and Cosmetic Act, detailed findings of fact based solely on the record must accompany the order and the findings had better be supported by the substantial evidence of that record to avoid being overturned by the U.S. Court of Appeals.

This kind of rulemaking under Section 701(e) is often described as "rulemaking on the record" or "legislation by adjudication." *See* Hamilton, *Rulemaking on a Record by the Food and Drug Administration,* 50 Texas L. Rev. 1132. As stated therein, the elaborate procedural requirements of Section 701(e) "certainly must set some sort of record for cumbersomeness."

The Section 701(e) procedure involves all the steps of an informal rulemaking proceeding under Section 4 of the Administrative Procedure Act (that is, proposed regulation/public comment/final regulation). But that is only for starters.

The "final" regulation may not be final because any person adversely affected by it may file objections, and the mere filing of objections operates to stay the part of the regulation objected to. The fireworks regulation was thus stayed in July 1974.

When legally sufficient objections to an order are filed, a full-fledged trial-type hearing is conducted before an administrative law judge. "Any interested person" may appear and participate either in person or by a representative. As in proceedings in a court of law, witnesses are sworn and may be cross-examined by any participant, objections are entertained to the admission or exclusion of evidence, provision is made

for interlocutory appeals, and a stenographic transcript is made, which becomes part of the record for decision. 21 CFR 2.58, *et seq. See* 50 Texas L. Rev., at 1136. The administrative law judge then prepares a report to the Commission complete with findings of fact and conclusions of law—an initial decision, but a very tentative one. On the basis of the record thus developed, the Commission issues its tentative order, complete with detailed findings of fact and conclusions of law on which it is based. *Id.* And that is where we are today.

The cause of regulatory reform—specifically the need to cut down regulatory lag—would be advanced if the Consumer Product Safety Commission would never again have to engage in another Section 701(e) proceeding. Under this same section, the Food and Drug Administration spent more than a decade in proceedings to handle the objections, exceptions and court challenges to FDA's "rulemaking on the record" to establish a standard for peanut butter. *See* 50 Texas L. Rev., at 1142–1145.

The formal evidentiary hearing required by Section 701(e) is unduly cumbersome, needlessly time-consuming and inordinately expensive in terms of both public and private resources. In my opinion, the law should be amended to abolish this requirement. Without the formal evidentiary hearing, there is still sufficient opportunity for public comment and judicial challenge, thereby assuring due process for all affected parties.

BARBARA HACKMAN FRANKLIN,
Commissioner.

March 4, 1976.

257-379—78——3

CONSUMER PRODUCT SAFETY COMMISSION OF THE UNITED STATES OF AMERICA

In the Matter of a Regulation Banning Certain Fireworks Devices as Hazardous Substances and Imposing Labeling Requirements

[CPSC 74–3]

Opinion of Commissioner R. David Pittle Concurring in Part and Dissenting in Part

PITTLE, COMMISSIONER: On May 16, 1974 the Consumer Product Safety Commission published a regulation (39 FR 17435) banning certain fireworks devices entirely and conditionally banning certain others unless they met specified labeling and performance requirements. This regulation had originally been proposed on May 16, 1973 by the Food and Drug Administration; the proceeding was subsequently transferred to this Commission upon its assuming responsibility for the administration and enforcement of the Federal Hazardous Substances Act.

Various representatives of the fireworks industry, as well as the State of Hawaii, objected to the May 16, 1974 order within the time and in the manner specified by law. Consequently, on July 11, 1974 the Commission stayed the effective date of the regulation and commenced the hearing procedures specified by § 701(e) of the Food and Drug Act (21 USC 371(e)).

Since that date the Commission has conducted extensive hearings and received numerous briefs, pleadings and submissions from the original objectors and from various intervenors. Based upon its review of the record thus developed the Commission is now, in accordance with 21 CFR 2.97, issuing a tentative order resolving the objections.

I concur with the reasoning of the tentative order on most of the issues in this proceeding. However, I dissent from the treatment accorded the banning of firecrackers.

In the May, 1974 order the Commission considered comments filed by various interested persons objecting to the unconditional banning of all firecrackers that FDA had proposed in May, 1973. Having carefully reviewed those comments, the Commission nevertheless concluded that:

> A total ban, as proposed, is necessary in view of the significant number of injuries relating to firecracker use; the unfeasibility of construction requirements to adequately protect the public; and the inadequacy of any possible precautionary labeling. (39 FR 17436).

A majority of the Commission has now concluded that only those firecrackers that contain more than 50 mg. of pyrotechnic composition should be banned. I cannot agree with that result. In my opinion the record developed in this proceeding overwhelmingly supports the conclusions reached by the Commission in May, 1974 with regard to firecrackers. And, I am simply unable to discern in the record evidence that would permit me to differentiate among various sizes of firecrackers. Therefore, I continue to adhere to the Commission's original decision to ban all firecrackers without regard to their powder content.

However, I would revise in one respect the May, 1974 order as it applies to firecrackers. The State of Hawaii objected to the ban on firecrackers as an unconstitutional interference with its citizens's freedoms of religion and of speech. Several parties, including Staff Counsel and Counsel for the American Public Health Association and for the Health Research Group have extensively briefed the issue raised by Hawaii's objection. These briefs argue that there is

no constitutionally guaranteed right to the use of firecrackers. This issue is difficult and exceedingly complex. However, it is one that I need not resolve at this time as I agree with those same parties that the Commission should continue to permit the religious use of firecrackers provided this can be done without adversely affecting the public health and safety. To accomplish this end I would permit an exception to the ban on firecrackers for those firecrackers distributed for religious use *only* in accordance with a state licensing and distribution network analogous to that presently used for the distribution of firecrackers for agricultural purposes. In my opinion such an exemption would best balance the needs of adherents of those religions in which the explosion of firecrackers plays a part, against the interests of the general public in protection against the hazards associated with firecrackers.

R. DAVID PITTLE, Ph. D.,
Commissioner.

MARCH 3, 1976.

APPENDIX C

CONSUMER PRODUCT SAFETY COMMISSION—FIREWORKS DEVICES

RULING ON EXCEPTIONS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

In the matter of Fireworks Devices, the Consumer Product Safety Commission, pursuant to sections 2(q)(1)(B), 2(q)(2) and 3(b) of the Federal Hazardous Substances Act, (15 U.S.C. 1261(q)(1)(B), 1261(q)(2) and 1262(b)); section 701(e), Federal Food, Drug and Cosmetic Act, (21 U.S.C. 371(e)) and 21 CFR 2.98, issues the following rulings on exceptions, findings of fact, conclusions of law and final order.

On March 4, 1976 the Commission published in the FEDERAL REGISTER (41 FR 9512) [1] its tentative rulings on exceptions, findings of fact, conclusions of law and order. Pursuant to the provisions of that tentative order and the rules of practice governing this proceeding, 21 CFR 2.97(b), the Commission allowed parties of record 30 days from the date of publication of the decision to file exceptions thereto. Filings were received from the following:

State of Hawaii

[1] The background and chronology of this proceeding are summarized in Part A of the March 4, 1976 FEDERAL REGISTER notice. To avoid needless duplication that portion of the tentative decision is incorporated herein by reference and anyone desiring a detailed analysis is referred to that notice.

American Pyrotechnics Association (APA)
National Society for the Prevention of Blindness (NSPB)[2]
American Public Health Association (APHA)
Mike's Fireworks and Toys, Inc.
American Academy of Pediatrics (AAP)
Fire Marshals Association of North America (FMNA)
Liddell Fireworks Co.
Chinese Chamber of Commerce of Hawaii
Pyrotechnic Specialties, Inc.
Oklahoma Pyrotechnics Association (OPA)
Gary Dusterwinkle, Phoenix Fuse Ltd.
Stonebraker Rocky Mountain Fireworks
Big Red Fireworks, Inc.
Blogin Sales Co.
National Fire Protection Association (NFPA)

Big Red Fireworks, Inc.; Gary Dusterwinkle; Pyrotechnic Specialties, Inc.; Chinese Chamber of Commerce of Hawaii and NFPA were not parties of

[2] NSPB along with its exceptions filed a motion that the Commission find that emergency conditions exist and that a ban on all firecrackers be issued immediately. On April 15, 1976 the Commission denied the motion and advised that the request would be treated as an exception to the tentative order. On April 28, 1976 NSPB and APHA filed a petition for review of the April 15, 1976 order in the United States Court of Appeals for the District of Columbia Circuit, *National Society For the Prevention of Blindness, et al.* v. *Consumer Product Safety Commission*, No. 76-1396. Accompanying the petition was a motion for emergency relief seeking an order of the Court to require the Commission to immediately ban all firecrackers. On May 21, 1976 the Court denied the NSPB-APHA motion. Several parties to this proceeding have filed motions to intervene in the Court action. OPA has filed a motion with the Commission to stay action on its final order pending resolution of the Court action. The Commission finds no basis for this request and the same is hereby denied.

record to the proceeding. Testimony was received at the hearings, however, from Dusterwinkle and representatives of Chinese Chamber of Commerce of Hawaii and NFPA. Mike's Fireworks and Toys, Inc. requested that the comments of Dusterwinkle be incorporated as exceptions of its firm. APA styled its filing as a response rather than exceptions and only seeks to preserve positions taken by that organization in the proceeding. All of the filings except APHA's were either received or postmarked on or before April 5, 1976.[3]

Based on the filings received, there seems to be some misunderstanding as to who in fact was a party to the proceeding which under the tentative order governs the eligibility to file exceptions. This appears to be the result of the fact that many of the participants at the hearings were not represented by attorneys. Thus persons who testified at the hearings may have been unaware that they were not formally listed as parties to the proceeding. In light of this fact and to assure fairness to unrepresented participants, the Commission has decided to treat those persons and organizations who individually or by a spokesperson participated in or testified at the hearings as parties and thus eligible to file exceptions.

Another misunderstanding which appears to have occurred relates to the form of the exceptions. In its tentative order the Commission specified that exceptions conform to the regulations contained in 21 CFR 2.97(b). Many of the filings, particularly from those persons and organizations who were not represented

[3] APHA on April 12, 1976 filed a request to join in the exceptions and motion of NSPB for a finding that emergency conditions exist and to immediately ban all firecrackers. In its order of April 15, 1976, the Commission permitted APHA to join in the NSPB filing.

by an attorney, are simply letters which do not conform to the regulation. Recognizing the difficulty of unrepresented participants in locating the regulations, and to insure fairness, the Commission has decided to wave the form requirement and to consider as exceptions the filings of all individuals or groups who have been determined eligible to file exceptions.[4]

Firecrackers

The most controversial and commented upon aspect of the tentative decision concerned the Commission's ban on those firecrackers in excess of 50 milligrams of pyrotechnic composition. Basically, the exceptions either contend that the Commission should have ordered a complete ban on all firecrackers with an appropriate exemption or should not have banned any firecrackers under the existing 2 grain limitation. A few of the exceptions still contend that the Commission should have followed the recommendation of the Administrative Law Judge to permit flashpowder of up to 1.2 grains and blackpowder[5] up to 2.0 grains. Many reiterate their claims that the National Electronic Injury Surveillance System (NEISS) and other injury data are not sufficiently precise to distinguish between injuries caused by Class B and Class C firecrackers or among the Class C firecrackers.

[4] Of the filings received, only those of Big Red Fireworks, Inc. and Pyrotechnic Specialties, Inc. are not eligible for treatment as exceptions. It should be noted, however, that the substance of the filings by both of those organizations is basically covered by the exceptions of other parties which have been considered.

[5] The exceptions of Mr. Dusterwinkle advise that the term "blackpowder firecracker" may be an incorrect designation. Some of the devices in question which explode through deflagration may utilize aluminum powder rather than charcoal. All of these devices, however, utilize a nitrate oxidizer.

The State of Hawaii, the Chinese Chamber of Commerce of Hawaii and Oklahoma Pyrotechnics Association (OPA) continue to adhere to the position that an exemption for all firecrackers up to 2.0 grains is required for religious purposes. Hawaii and OPA urge the same exemption for "cultural" purposes. Hawaii also claims that 50 mg. firecrackers will not satisfy religious needs since they do not create a sufficient "emotional awe inspiring feeling within the user."

Since the date of the tentative order, one to [sic] the Commissioners, who was in the majority on the firecracker question, has left the Commission to assume duties in another agency. This has left the Commission equally divided in its views on the firecracker matter with two Commissioners voting for adoption of the 50 mg. limitation in the tentative order and two Commissioners favoring a total ban with an exemption for religious use. In addition, the President has nominated a new Chairman who has recently been confirmed by the Senate. Once the new Chairman takes office the present Chairman may leave the Commission. Thus for the foreseeable future it appears that the Commission will continue to have only four members. The Commission is concerned that the changes in personnel could delay a majority final order on this question indefinitely. Even if the new Chairman should be sworn in soon, he will be faced with a formidable workload and may be unable to review this voluminous matter for some time. Moreover, if he were to vote in favor of the tentative order, the Commission would face the same division which it faces today.

To resolve this problem and to best protect the public health and safety and the rights of the parties, the Commission has looked to the judiciary which commonly faces such divisions. When confronted with this problem, the courts generally have adopted a pol-

icy of affirming or allowing the order under review to stand. Because of the current impasse, the Commission believes that this is the most realistic manner[6] in which it can approach its dilemma. The Commission recognizes that the statutory requirements of section 701(e), Federal Food, Drug and Cosmetic Act (FFDCA), (21 U.S.C. 371(e)), and the Administrative Procedure Act (APA), are different from guidelines followed by the courts, particularly as to the fact finding requirements and the necessity for ruling on exceptions. The situation, particularly as presented in this case, is not, however, significantly different. The Commission has undertaken its duty of fact finding[7] pursuant to the requirements of section 701(e) and the exceptions filed do not raise any substantial matters which the Commission had not considered in arriving at its tentative decision. The case at this stage is more akin to an appellate review of the tentative order.[8]

[6] The Commission recognizes the existence of other alternatives to resolve such problems. See generally, *Greater Boston Television Corp.* v. *FCC.*, 143 U.S. App. D.C. 383, 444 F. 2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971) and 406 U.S. 950 (1972); *Screws* v. *United States*, 325 U.S. 91 (1945) (Opinion of Justice Rutledge); *Women Strike for Peace* v. *Hickel*, 137 U.S. App. D.C. 20, 420 F. 2d 507 (1969) (Opinion of Judge Wright). This case presents a significantly different problem from the situations faced in those cases. Here the Commission is bound by the fact finding requirements of section 701(e) and thus has a much narrower authority to exercise discretion.

[7] The procedure governing this case requires the Commission to be the initial fact finder, and is thus a departure from the normal APA proceeding wherein an administrative law judge acts as initial fact finder. Compare section 701(e), 21 CFR 2.48 *et seq.*, and (5 U.S.C. 557).

[8] The fact that the Commission is reviewing its own decision does not significantly differ from the situation which an appellate Court would face when it is equally divided on whether or not to rehear *en banc* a decision of one of its panel divisions.

Based on these considerations and because of the very practical problems faced, the full Commission has decided to allow the tentative findings, conclusions and order of its March 4, 1976 decision as to the permissible levels of pyrotechnic composition in firecrackers to stand as the final decision of the Commission. Exceptions raised to this portion of the tentative decision are denied for the reasons stated in the tentative decision.

Fireworks Other Than Firecrackers

The exceptions regarding the fireworks performance requirements again generally follow the positions which the parties raised throughout the proceeding and which the Commission considered in issuing its tentative decision. The exceptions continue to urge the Commission to adopt the fusing requirements which the Administrative Law Judge recommended including the requirement for visible burning point, color coding and fuse adhesives. The Commission has specifically dealt with these issues in the tentative decision and adopts the reasons stated therein to support the denial of the exceptions.

Blogin notes that the Commission did not discuss the recommendation of the Administrative Law Judge with respect to packaging of fireworks devices so as to minimize damage to fuses. The Commission is generally in accord with such a requirement. However, it believes that such a provision cannot be included at this stage because it was not included in the specifications of the Commission's May 16, 1974 order.[9] The Commission believes that the recommendation is con-

[9] Throughout the exceptions many of the parties have failed to understand that because of the statutory procedural notice requirements, the Commission cannot simply add provisions to the regulation even though they may be desirable.

structive and will have the staff study this and several other recommendations referred to in the tentative decision with a view towards refining the regulation to best insure public safety.

Labeling

The labeling requirements adopted in the tentative decision conformed to those contained in the May 16, 1974 order, except for the optional use of the word "close" in certain instances. The exceptions reiterate the same contentions which were raised throughout the proceeding and which were before the Commission when it issued its tentative decision. The Commission finds no reason to alter these provisions at this time and adopts the findings of the tentative decision in this regard as the final decision.

Effective Date

In the tentative order the Commission decided to establish an effective date for the entire regulation 180 days after the issuance of the final order. The Commission also ruled therein that there was no basis for making an emergency finding to require an effective date of less than 90 days. The exceptions filed by NSPB and APHA have requested the Commission to make an emergency finding and to implement a ban on all firecrackers immediately. While the exceptions only refer to a ban on all firecrackers, the Commission assumes that in light of its decision not to ban all firecrackers that NSPB and APHA would also request the same emergency relief for those firecrackers above the prescribed 50 mg. limitation. The basis stated for the emergency finding is the alleged expectation of increased firecracker injuries during the upcoming fourth of July celebration. The Commission in rendering the tentative decision discussed the problems of establishing an effective date in time for the upcoming celebration. It was found that because of the lengthy hearing and decisional process required by section 701(e), the industry's order-delivery period, the uncertainty created because of the departure from the Administrative Law Judge's recommendations and the resulting chaotic enforcement situation, such an early effective date was not possible and could result in substantial unfairness.

While the Commission is desirous of making its regulation effective at the earliest possible date it must follow the procedures established by Congress for implementing its decision. The stautory scheme governing this proceeding envisions three time situations for implementing a regulation. First is the "imminent hazard" provision of section 2(q)(2), FHSA. (See statement of policy and interpretation at 21 CFR 3.73.) This is reserved for the most dangerous products and upon finding an imminent danger, the Commission can implement a regulation immediately during the pendency of any rulemaking proceedings. The second situation is the "emergency conditions" provision of section 701(c) which allows the Commission after rulemaking proceedings and a final decision to implement a regulation earlier than the prescribed 90 day effective date upon a finding that emergency conditions exist requiring such a measure. The third situation is the normal effective date under section 701(e) of 90 days or longer from publication of the final order. In all instances, the Commission is regulating products which by definition are dangerous and affect the public health and safety. The differing effective dates are obviously directed to the severity and degree of danger posed by the products being regulated and provides a balance between the

immediate need for safety and the detrimental economic effect of immediate regulation.

Determination of imminent hazard or emergency conditions by their very nature depend on a showing of a very severe or grave danger. Also to be considered are the number of injuries as well as their duration. See 21 CFR 3.73(b). Finally, these terms as utilized in the statute herein connote the concept that a new or unforeseen circumstance warrants immediate action. It would appear that for the Commission to make a finding of emergency conditions, it could only do so on a showing that the danger presented is not only serious and widespread but is different from the long standing status quo.

While the Commission has determined that firecrackers in the range of 50–130 milligrams are hazardous and that a ban should be implemented, the evidence of record does not demonstrate that the degree of the hazard warrants emergency action. The hazard posed by firecrackers, like many products subject to the Commission's jurisdiction, is not something new. Nor is it novel that firecrackers will be used by the public on the fourth of July. While the Commission recognizes that the celebration this year will be greater than in other years, nothing in the evidence of record or in the submissions of NSPB or APHA provides the Commission with the evidentiary basis upon which it can determine if a substantial increase in the number of injuries from firecrackers in the range of 50–130 milligrams will occur. Indeed the evidence of record tends to indicate that no significant increase in firecracker injuries can be expected. As noted in the tentative decision, the number of firecracker injuries has declined in recent years due to increased state regulation and the regulation at issue in this proceeding. Also there has been no showing

that manufacturers, importers and the like have substantially increased the volume of firecrackers which will be sold this year. In view of the uncertainty as to whether a ban would be imposed or what level of powder would be allowed and the repurchase requirements of the FHSA (15 U.S.C. 1274), it would appear that businessman would find it risky to flood the market with firecrackers in excess of 50 mg. at this time. Any attempt to project an increase in injuries caused by firecrackers in the range of 50–130 milligrams would of necessity be based on speculation and would not be supported by any sound evidentiary finding.

Accordingly, the Commission cannot make the requested emergency finding and adopts its tentative decision to require the regulation to become effective December 6, 1976. It is important to stress that the Commission can only act to protect the public within the strict statutory and procedural requirements established by Congress. Given these requirements the Commission has attempted to provide the greatest possible safety at the earliest feasible date.[10]

Findings of Fact

Pursuant to the requirements of section 701(e), FFDCA, (21 U.S.C. 371(e)) and 21 CFR 2.98 the Commission adopts and incorporates herein as its final decision findings of fact numbered 1–8, 12, 13, 17, 22–43 and supplementary findings thereto of its tentative decision, 41 FR 9516–9524. Findings of fact numbered 9–11, 14–16, 18–21 and supplementary findings thereto of the Commission's tentative decision, 41 FR 9516–9523, are allowed to stand and are incorporated herein

[10] All exceptions which have not been specifically discussed herein have been considered and are denied for the reasons set forth in the tentative decision, 41 FR 9512, *et seq.*

as the final decision of the Commission by reason of a divided vote.

Conclusion of Law

Pursuant to the requirements of section 701(e), FFDCA, (21 U.S.C. 371(e)) and 21 CFR 2.98, the Commission adopts and incorporates herein as its final decision conclusions of law numbered 1–4, 6–10, of its tentative decision, 41 CFR 9524. Conclusion of law numbered 5 of the Commission's tentative decision, 41 FR 9524, is allowed to stand and is incorporated herein as the final decision of the Commission by reason of a divided vote.

Therefore, pursuant to provisions of the Federal Hazardous Substances Act (secs. 2(q)(1)(B), 2(q)2, 3(b), 74 Stat. 374–375 as amended 80 Stat. 1304–1305; (15 U.S.C. 1261, 1262)), the Federal Food, Drug, and Cosmetic Act (sec. 701(e), 52 Stat. 1055, as amended; (21 U.S.C. 371 (e)), and under authority vested in the Commission by the Consumer Product Safety Act (sec. 30(a), 86 Stat. 1231; (15 U.S.C. 2079(a))), Subchapter C of Title 16, Chapter II is amended as follows:

1. Section 1500.14 is amended by adding a new paragraph (b)(7) as follows:

§1500.14 Products requiring special labeling under section 3(b) of the act.

* * * * * * *

(b) The Commission finds that the following substances present special hazards and that, for these substances the labeling required by section 2(p)(1) of the act is not adequate for the protection of the public health. Under section 3(b) of the act, the following specific label statements are deemed necessary to supplement the labeling required by section 2(p)(1) of the act:

* * * * * * *

(7) *Fireworks devices.* Because of the special hazards presented by fireworks devices if not used in a certain manner, the following listed fireworks devices shall be labeled as indicated:

(i) *Fountains.*

Warning (or Caution)
FLAMMABLE (or EMITS SHOWERS OF SPARKS, if more descriptive).
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Place on level surface.
Light fuse and get away.

(ii) *California candles.*

Warning (or Caution) Emits Showers of Sparks
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Hold in hand at bottom of tube.
Point away from body so that neither end points toward body.

(iii) *Spike and handle cylindrical fountains.*

(A) *Spike fountains.*

Warning (or Caution) Emits Showers of Sparks
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Stick firmly in ground in an upright position.
Do not hold in hand.
Light fuse and get away.

(B) *Handle fountains.*

Warning (or Caution) Emits Showers of Sparks

Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Hold in hand—point away from body.
Light fuse.

(iv) *Roman Candles.*

Warning (or Caution) Shoots Flaming Balls
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Stick butt end in ground.
Do not hold in hand.
Light use and get away.

(v) *Rockets with sticks.*

Warning (or Caution) Flammable
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Place in wooden trough or iron pipe at 75° angle, pointing away from people or flammable material.
Do not hold in hand.
Light fuse and get away.

(vi) *Wheels.*

(Warning (or Caution) Flammable (or Emits Showers of Sparks, if More Descriptive)
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Attach security by means of a nail through the hole (or place on hard flat surface, for ground spinners).
Light fuse and get away.

(vii) *Illuminating torches.*

Warning (or Caution) Flammable (or Emits Showers of Sparks, if More Descriptive)

Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Hold in hand—point away from body, clothing, or other flammable material (or place upright on level ground. Do not hold in hand, if more descriptive).
Light fuse (or light fuse and get away, if more descriptive).

(viii) *Sparklers.*

On the front and back panels:

Warning (or Caution) Flammable

On the side, front, back, top, or bottom panel.

Caution

Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Do not touch glowing wire (or do not touch hot plastic, wood, etc., if more descriptive).
Hold in hand with arm extended away from body.
Keep burning end or sparks away from wearing apparel or other flammable material.

(ix) *Mines and shells.*

Warning (or Caution) Emits Showers of Sparks (or Shoots Flaming Balls, if More Descriptive)
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Place on hard smooth surface (or place upright on level ground, if more descriptive). Do not hold in hand.
Light fuse and get away.

(x) *Whistles without report.*

Warning (or Caution) Flammable
SHOOTS WHILE IN AIR (if applicable)

Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Do not hold in hand.
Light fuse and get away.

(xi) *Toy smoke devices and flitter devices.*

Warning (or Caution)
Flammable (or Emits Showers of Sparks, if More Descriptive)
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Do not hold in hand.
Light fuse and get away.

(xii) *Helicopter-type rockets.*

Warning (or Caution)
Flammable (or Emits Showers of Sparks, if More Descriptive)
Use only under [close] adult supervision. (Use of the word close is optional.)
For outdoor use only.
Place on hard, open surface.
Light fuse and get away.

(xiii) *Party poppers.*

Warning (or Caution) Flammable
Use only under [close] adult supervision. (Use of the word close is optional.)
Do not point either end toward face or other person.
Hold in hand—jerk string.

(xiv) *Missile-type rockets.*

Warning (or Caution)
Flammable (or Emits Showers of Sparks, if More Descriptive)
Use only under [close] adult supervision. (Use of the word close is optional.)

For outdoor use only.
Place on hard, open surface.
Light fuse and get away.

(xv) *Labeling—General.* Any fireworks device not required to have a specific label as indicated above shall carry a warning label indicating to the user where and how the item is to be used and necessary safety precautions to be observed. All labels required under this section shall comply with the requirements of § 1500.121 of these regulations.

2. Section 1500.17 is amended by revising paragraphs (a) (8) and (9) as follows:

§ 1500.17 Banned hazardous substances.

(a) Under the authority of section 2(q)(1)(B) of the act, the Commission declares as banned hazardous substances the following articles because they possess such a degree or nature of hazard that adequate cautionary labeling cannot be written and the public health and safety can be served only by keeping such articles out of interstate commerce:

* * * * *

(8) Firecrackers designed to produce audible effects, if the audible effect is produced by a charge of more than 50 milligrams (.772 grains) of pyrotechnic composition (not including firecrackers included as components of a rocket), aerial bombs, and devices that may be confused with candy or other foods, such as "dragon eggs," and "cracker balls" (also known as "ball-type caps"), and including kits and components intended to produce such fireworks except such devices which meet all of the following conditions:

(i) The fireworks devices are distributed to farmers, ranchers, or growers through a wildlife management program administered by the U.S. Department of Interior (or by equivalent State or local governmental agencies); and

(ii) Such distribution is in response to a written application describing the wildlife management problem that requires use of such devices, is of a quantity no greater than required to control the problem described, and is where other means of control is unavailable or inadequate.

(9) All fireworks devices, other than firecrackers, including kits and components intended to produce such fireworks, not otherwise banned under the act, that do not comply with the applicable requirements of Part 1507 of this chapter, except fireworks devices which meet all the following conditions:

(i) The fireworks devices are distributed to farmers, ranchers, or growers through a wildlife management program administered by the U.S. Department of the Interior (or by equivalent State or local government agencies); and

(ii) Such distribution is in response to a written application describing the wildlife management problem that requires use of such devices, is of a quantity no greater than required to control the problem described, and is where other means of control is unavailable or inadequate.

* * * * * * *

§ 1500.85 [Amended]

3. Section 1500.85, *Exemption from classification as banned hazardous substances,* is amended by revising paragraph (a)(2) as follows:

(a) * * *

(2) Firecrackers designed to produce audible effects, if the audible effect is produced by a charge of not more than 50 milligrams (.772 grains) of pyrotechnic composition.

* * * * * * *

4. Part 1507 is revised as follows:

Sec.

AUTHORITY: (Sec. 2(q)(1)(B), (2), 74 Stat. 374 as amended 80 Stat. 1304–1305; (15 U.S.C. 1261); sec. 701(e), 52 Stat. 1055 as amended; (21 U.S.C. 371(e)); sec. 30(a), 86 Stat. 1231; (15 U.S.C. 2079(a))).

§ 1507.1 Scope.

This Part 1507 prescribes requirements for those fireworks devices (other than firecracks) not otherwise banned under the act. Any fireworks device (other than firecracks) which fails to conform to applicable requirements is a banned hazardous substance and is prohibited from the channels of interstate commerce. Any fireworks device not otherwise banned under the act shall not be a banned hazardous substance by virtue of the fact that there are no applicable requirements prescribed herein.

§ 1507.2 Prohibited chemicals.

Fireworks devices shall not contain any of the following chemicals;

(a) Arsenic sulfide, arsenates, or arsenites.

(b) Boron.

(c) Chlorates, except:

(1) In colored smoke mixtures in which an equal or greater amount of sodium bicarbonate is included.

(2) In caps and party poppers.

(3) In those small items (such as ground spinners) wherein the total powder content does not exceed 4 grams of which not greater than 15 percent (or 600 milligrams) is potassium, sodium, or barium chlorate.

(d) Gallates or gallic acid.

(e) Magnesium (magnesium/aluminum alloys, called magnalium, are permitted).

(f) Mercury salts.

(g) Phosphorus (red or white). Except that red phosphorus is permissible in caps and party poppers.

(h) Picrates or picric acid.

(i) Thiocyanates.

(j) Titanium, except in particle size greater than 100-mesh.

(k) Zirconium.

§ 1507.3. Fuses.

(a) Fireworks devices that require a fuse shall:

(1) Utilize only a fuse that has been treated or coated in such a manner as to reduce the possibility of side ignition. Devices such as ground spinners that require a restricted orifice for proper thrust and contain less than 6 grams of pyrotechnic composition are exempted from § 1507.3(a)(1).

(2) Utilize only a fuse which will burn at least 3 seconds but not more than 6 seconds before ignition of the device.

(b) The fuse shall be securely attached so that it will support either the weight of the fireworks device plus 8 ounces of dead weight or double the weight of the device, whether is less, without separation from the fireworks device.

§ 1507.4 Bases.

The base or bottom of fireworks devices that are operated in a standing upright position shall have the minimum horizontal dimension or the diameter of the base equal to at least one-third of the height of the device including any base or cap affixed thereto.

§ 1507.5 Pyrotechnic leakage.

The pyrotechnic chamber in fireworks devices shall be sealed in a manner that prevents leakage of the pyrotechnic composition during shipping, handling, and normal operation.

§ 1507.6 Burnout and blowout.

The pyrotechnic chamber in fireworks devices shall be constructed in a manner to allow functioning in a normal manner without burnout or blowout.

§ 1507.7 Handles and spikes.

(a) Fireworks devices which are intended to be hand-held and are so labeled shall incorporate a handle at least 4 inches in length (see § 1500.14(b)(7)). Handles shall remain firmly attached during transportation, handling and full operation of the device, or shall consist of an integral section of the

device at least four inches below the pyrotechnic chamber.

(b) Spikes provided with fireworks devices shall protrude at least 2 inches from the base of the device and shall have a blunt tip not less than ⅛-inch in diameter or ⅛-inch square.

§ 1507.8 Wheel devices.

Drivers in fireworks devices commonly known as "wheels" shall be securely attached to the device so that they will not come loose in transportation, handling, and normal operation. Wheel devices intended to operate in a fixed location shall be designed in such a manner that the axle remains attached to the device during normal operation.

§ 1507.9 Toy smoke devices and flitter devices.

(a) Toy smoke devices shall be so constructed that they will neither burst nor produce external flame (excluding the fuse and firstfire upon ignition) during normal operation.

(b) Toy smoke devices and flitter devices shall not be of such color and configuration so as to be confused with banned fireworks such as M–80 salutes, silver salutes, or cherry bombs.

(c) Toy smoke devices shall not incorporate plastic as an exterior material in [*sic*] the pyrotechnic composition comes in direct contact with the plastic.

§ 1507.10 Rockets with sticks.

Rockets with sticks (including skyrockets and bottle rockets) shall utilize a straight and rigid stick to provide a directed and stable flight. Such sticks shall remain straight and rigid and attached to the driver so as to prevent the stick from being damaged or detached during transportation, handling, and normal operation.

§ 1507.11 Party poppers.

Party poppers (also known by other names such as "Champagne Party Poppers," and "Party Surprise Poppers,") shall not contain more than 0.25 grains of pyrotechnic composition. Such devices may contain soft paper or cloth inserts provided any such inserts do not ignite during normal operation.

Effective date: The regulations promulgated above shall become effective on December 6, 1976.

(Secs. 2(q)(1)(B), 2(q)(2), (3)(b), 74 Stat. 374–375 as amended, 80 Stat. 1304–1305; (15 U.S.C. 1261, 1262); sec. 701(e), 52 Stat. 1055 as amended (21 U.S.C. 371(e)); sec. 30(a), 86 Stat. 1231; (15 U.S.C. 2079(a))).

Dated June 2, 1976.

SADYE E. DUNN,

Secretary, Consumer Product Safety Commission.

[FR Doc.76–16574 Filed 6–7–76 8:45 a.m.]

APPENDIX D

Consumer Product Safety Commission—Fireworks Devices

CONFIRMING ORDER AND SUPPLEMENTARY FINDINGS

On June 23, 1977 the United States Court of Appeals for the District of Columbia Circuit issued an order in "National Society for the Prevention of Blindness, et al. v. Consumer Product Safety Commission," Nos. 76–1495, 76–1723, 76–1788, remanding to the Commission the record in rulemaking action "In the Matter of Fireworks Devices," Docket 74–3, with instructions that the Commission clarify the factual basis for its final rules and take all actions necessary to bring its rules into full statutory compliance.

The Court's order indicates that the Commission's final order was deficient in that the Commission had not issued a final order by a majority vote on the decision to ban firecrackers in excess of 50 mg.[1] Subsequent to the issuance of the Court order the two Commissioners who were not members of the Commission on the date of the June 8, 1976 order began taking the necessary steps to inform themselves of the issues, evidence, testimony and the positions of the respective parties to the rulemaking with regard to firecrackers. The full Commission was also briefed on the matter and on June 30, 1977 the Commission met in

[1] The Court's remand order did not effect any of the other provisions of the Commission's order of June 8, 1976 (41 FR 22932, et seq.).

Executive Session and again voted on the matter. It decided by a 3–2 vote to adopt the tentative decision dated March 4, 1976 as well as the enumerated and supplementary findings of fact and conclusions of law contained herein as the final decision of the Commission. At the same time the Commission also adopted the provisions of the final order dated May 6, 1976 with respect to the rulings on exceptions and the final order.

In its order of June 23, 1977 the Court has also expressed concern regarding finding of fact number 12 of the Commission's tentative decision (41 FR 9523) and the lack of explanation of a contrary ruling by the Commission's administrative law judge. The finding in question is as follows:

> 12. The nature and degree of the hazards posed by firecrackers containing pyrotechnic composition in excess of 50 milligrams (.772 grains) cannot be remedied through cautionary labeling.

This is basically an ultimate finding required under section 2(q)(1)(B), FHSA[2] prior to any banning action. The determination as to whether labeling is adequate is generally a subjective determination and varies with the hazard posed by a product.

In the present case the administrative law judge recommended that labeling in addition to certain other requirements would provide adequate safety for some firecrackers. He also found labeling inadequate for certain other firecrackers. Specifically he recommended

[2] The necessity of making a finding concerning the inadequacy of cautionary labeling is largely due to the evolution of the FHSA. The law originally only applied to cautionary labeling for hazardous substances. The act was amended in 1965 to allow for a ban of those substances for which cautionary labeling was deemed inadequate to protect the public health and safety.

that blackpowder firecrackers up to 2 grains pyrotechnic composition and flashpowder firecrackers up to 1.2 grains of pyrotechnic composition would be safe if such firecrackers included a visibly burning fuse and included certain specific cautionary labeling. Although unstated, this recommendation, by necessity requires the conclusion that all flashpowder firecrackers in excess of 1.2 grains and up to 2 grains (permitted prior to the current regulation) were not capable of adequate cautionary labeling to protect against the hazards presented. The Commission in its tentative decision rejected the administrative law judge's recommendations insofar as they were applicable to blackpowder firecrackers on the ground that the evidence did not demonstrate those firecrackers to be any safer than flashpowder firecrackers. (See 41 FR 9519.) The 1.2 flashpowder recommendation was rejected because it was not shown to be a common production unit and was based on a single staged demonstration at the hearings. 41 FR 9519. Also, the Commission rejected the recommendation on the fusing requirement on the ground that the evidence did not demonstrate that the visibly burning fuse was available or would work in firecrackers. See 41 FR 9519, 9520.

The Commission was also concerned with the special labeling recommended by the administrative law judge in that it was not based on any expert psychological evidence and was possibly procedurally deficient in that it had not been proposed in the original regulation (41 FR 9522). The Commission did agree to adopt the administrative law judge's labeling recommendations to the extent that they complied with the statutory labeling requirements of section 2(p), FHSA and regulations issued thereunder. 41 FR 9522.

It is apparent from the report of the administrative law judge on firecrackers that his recommendation was not based solely on the ground that labeling was adequate, but that labeling in addition to the blackpowder, visibly burning fuse and reduction of flashpowder were adequate. As indicated above the underpinnings of the recommendation with respect to blackpowder, 1.2 grains of flashpowder[3] and the visibly burning fuse provision were simply not supported by sufficient evidence to be included as mandatory Federal safety requirements.

The Commission also believes that cautionary labeling standing alone, either that suggested by the administrative law judge or other potential label warnings are not adequate to protect the public from the hazards posed by firecrackers over 50 mg. The administrative law judge was of the view that proper supervision and education particularly by children along with specific labeling and his other recommendations would reduce the hazards posed by firecrackers. While the Commission does not disagree that proper supervision and education can to some degree reduce fireworks injuries, the overwhelming evidence of record indicates that firecracker injuries are caused by misuse and indeed abuse, particularly by children. The Commission obviously has no power to deal with problems of parental supervision and education. However, it cannot ignore the natural tendencies of children and their attraction to firecrackers which is poignantly depicted in the record of this case. The Commission simply sees no practical way in which labeling can be

[3] The decision of the Commission in the tentative order and adopted herein not to ban firecrackers under 50 mg. of powder is based on reasoning similar to the rationale of the administrative law judge on flashpowder firecrackers, namely that a reduction in powder content would reduce the hazard.

structured so as to prevent misuse of firecrackers by children. The suggestion by the administrative law judge that labels include various warnings [4] do not appear to be adequate to remedy the misuse problem. Those suggested warnings that are primarily directed to adults will not solve the problem with respect to children. Moreover, it is unrealistic to believe that children will not obtain and misuse firecrackers. The overwhelming evidence of record as well as common experience suggests otherwise. The fact that warnings are ignored by children is further demonstrated from the fact that firecrackers have included cautionary labeling which is similar to that suggested by the administrative law judge for several years under the statutory labeling requirements of section 2(p), FHSA and yet injuries to children from misuse persist.[5] As the foregoing demonstrates the Commission is of the view that cautionary labeling is inadequate to reduce the hazard posed by firecrackers in excess of 50 mg.

As a result of the Court's determination regarding the validity of the Commission's June 8, 1976 order, the Commission is concerned about the effective date of its ban on firecrackers containing pyrotechnic composition in excess of 50 mg. Since the Court did not specifically set the Commission's banning order aside, it is believed that the ban remains in effect. To elimi-

---

[4] The warnings recommended by the administrative law judge include: Danger—misuse may cause serious injury; attach firecracker string to pole, light fuse and slowly lower into wire basket or cage away from spectators; for use only by adults or under close adult supervision. Do not hold in hand—light fuse—throw on ground away from spectators—get away.

[5] The cautionary labeling used in firecrackers pursuant to section 2(p) reads as follows: Caution—explosive; do not hold in hand; lay on ground—light fuse; get away; use only under adult supervision. See Exhibit S.C. 51.

nate any question concerning the effective date as a result of the Court's June 23, 1977 order, the Commission believes that emergency conditions exist within the meaning of section 701(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(e) requiring the ban to be effective immediately. In this regard there is no reason at this time to permit a 90-day lead period prior to the effective date of the regulation. All parties as well as the general public have been on notice for over a year (since June 8, 1976) of the ban on 50 mg. firecrackers. In its June 8, 1976, order the Commission not only permitted the 90-day statutory lead period but also extended the period for an additional 90 days to allow for an orderly and enforceable transition to the new regulation. Any further delay in the effective date at this time would not further the statutory purpose of the 90-day lead provision. More importantly, however, since the peak period for sale of fireworks, the Fourth of July season, is now in progress, there is a potential for large scale sales of firecrackers in excess of 50 mg., which the Commission has found sufficiently hazardous to ban from the channels of interstate commerce, unless the Commission takes the necessary steps to make the ban effective immediately. Accordingly, the Commission finds that emergency conditions exist within the meaning of section 701(e) so as to warrant an immediate effective date for the ban on firecrackers in excess of 50 mg.

Findings of Fact

Pursuant to the requirements of section 701(e), FFDCA, 21 U.S.C. 371(e) and 21 CFR 2.98 the Commission adopts and incorporates herein as its final decision findings of fact numbered 9–1, 14–16, 18–21 and

supplementary findings thereto of the Commission's tentative decision, 41 FR 9516–9523, and supplementary findings contained herein.

Conclusion of Law

Pursuant to the requirements of section 701(e), FFDCA, 21 U.S.C. 371(e) and 21 CFR 2.98, the Commission adopts and incorporates herein as its final decision conclusion of law numbered 5 of the Commission's tentative decision, 41 FR 9524.

Therefore, pursuant to provisions of the Federal Hazardous Substances Act (sec. 2(q)(1)(B), 2(q)2, 3(b), 74 Stat. 374–375 as amended 80 Stat. 1304–1305 (15 U.S.C. 1261, 1262), the Federal Food, Drug, and Cosmetic Act (sec. 701(e), 52 Stat. 1055, as amended; (21 U.S.C. 371(e)), and under authority vested in the Commission by the Consumer Product Safety Act (sec. 30(a), 86 Stat. 1231; (15 U.S.C. 2079(a)), Subchapter C of Title 16, Chapter II is amended by amending §§ 1500.14, 1500.17, 1500.85, and by revising Part 1507 as set forth at 41 FR 22934.

(Secs. 2(q)(1)(B), 2(q)(2), (3)(b), 74 Stat. 374–375 as amended, 80 Stat. 1304–1305; (15 U.S.C. 1261, 1262); sec. 701(e), 52 Stat. 1055, as amended (21 U.S.C. 371(e)); sec. 30(a), 86 Stat. 1231; (15 U.S.C. 2079(a)).)

Effective date: This order is effective June 30, 1977.
Dated: June 30, 1977.

RICHARD E. RAPPS,

Secretary, Consumer Product Safety Commission.

[FR Doc. 77–19202 Filed 6–30–77; 6:07 pm]

U.S. GOVERNMENT PRINTING OFFICE: 1978